

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1248

Reversed & Remanded

PROCEDURAL HISTORY: On September 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 84617). Claimant filed a timely request for hearing. On October 25, 2016, ALJ Vincent conducted a hearing, and on October 28, 2016 issued Hearing Decision 16-UI-70183, concluding claimant quit work with good cause. On November 8, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The ALJ admitted Exhibit 2 into the record, including 8 pages titled “statement of earnings and deductions” and 4 pages titled “daily job report.” Audio recording at ~ 9:45 (the ALJ described the documents as payroll documents and admitted them into evidence). The ALJ did not mark the payroll documents with the appropriate exhibit stamp, however. Because it was apparent on the record that the ALJ did admit the documents, and described them sufficiently for the documents to be identified, EAB corrected omission as a clerical matter, marking each of the payroll documents as Exhibit 2. EAB considered Exhibit 2 in its entirety when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-70183 is reversed, and this matter remanded.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Generally speaking, “good cause” is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer

for an additional period of time. For purposes of applying OAR 471-030-0038(4), OAR 471-030-0038(5)(d) provides, “[i]f an individual leaves work due to a reduction in the rate of pay, the individual has left work without good cause unless the newly reduced rate of pay is ten percent or more below the median rate of pay for similar work in the individual's normal labor market area. The median rate of pay in the individual's labor market shall be determined by employees of the Employment Department adjudicating office using available research data compiled by the department.”

In Hearing Decision 16-UI-70183, the ALJ found as fact that the employer reduced claimant’s wage from \$34.13 per hour to \$20.10 per hour, and that the median wage for Operating Engineers and Other Construction Equipment Operators in Yamhill, Oregon was \$23.22 per hour.¹ Because \$20.10 per hour was more than 10% less than that median wage, the ALJ concluded claimant had good cause for quitting work. We disagree, and conclude that the record must be further developed.

The ALJ determined that the occupational profile in the Department’s wage information research data applicable to claimant was “Operating Engineers and Other Construction Equipment Operators.”² However, workers in that occupation profile “[o]perate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors, or front-end loaders to excavate, move, and grade earth, erect structures, or pour concrete or other hard surface pavement. May repair and maintain equipment in addition to other duties. Excludes “Crane and Tower Operators” (53-7021) and “Extraction Workers” (47-5000).”³ The description did not list “water truck operator” among its covered duties, and the record fails to show if the truck claimant drove was or was not a “pump” such that it would be included in that occupation profile. The Department’s research data does not include any occupation profiles that corresponded to claimant’s Bureau of Labor and Industries and prevailing wage descriptions of “power operator” or “power operator 5” or “equipment operator,” and, while the data yielded search results for “water truck operator,” the resulting profile “truck drivers, heavy and tractor-trailer” does not fit the work described in this case. Given the lack of a match to claimant’s specific job in the Department’s data, and the fact that OAR 471-030-0038(5)(d) requires that a median rate of pay “*shall be* determined by employees of the Employment Department adjudicating office,” we direct the Office of Administrative Hearings to send notice of the remand hearing to the Department, and direct the Department to provide an adjudicating office employee as a

¹ The ALJ gathered information from the Department’s “qualityinfo.org” website to collect the median wage data he used in his decision, and disclosed that he had done so. See Hearing Decision 16-UI-70183 at 2. However, the ALJ also stated at the beginning of the hearing that he planned to send an email to the Department asking its opinion of the median wage data issue in this case, received the parties’ agreement to do so (Audio recording at ~ 6:50), and at the end of the hearing stated again that he was holding the hearing record open for five days to receive the Department’s response to his inquiry about the median wage in claimant’s labor market (Audio recording at ~ 47:35). The ALJ did not disclose in his decision, or otherwise, that he actually made *ex parte* contact with the Department or its employees; nor, to any extent he might have had contact, did he disclose the substance of that communication. OAR 137-003-0600(9) (January 31, 2012); OAR 137-003-0625(2) (January 31, 2012) (requiring that the name(s), communication(s), response(s) and memo(s) about the communication(s) and response(s) be placed in the record whenever an ALJ receives an ex party communication during the pendency of a contested case proceeding); OAR 137-003-0625(3) (requiring that the ALJ advise the parties when an ex parte communication has been made part of the record and allow parties the opportunity to respond to it).

² See <https://www.qualityinfo.org>, search term “Operating Engineers and Other Construction Equipment Operators.”

³ *Id.*

witness at the hearing on remand so the ALJ can make an appropriate inquiry into the correct occupation profile for claimant's work and establish the median wage for that work in claimant's labor market.

Although claimant's July 3 paycheck reflected a reduction from \$34.13 per hour to \$20.10 per hour, he also testified that within five days of that initial reduction the employer had retroactively increased his pay rate from the \$20.10 per hour "driver" rate to the \$26.43 per hour "labor" rate. Claimant's July 8 and all ensuing paystubs show that the employer continued to pay claimant at the \$26.43 per hour rate thereafter. Claimant's pay rate was, therefore, reduced to \$26.43 per hour, not \$20.10 per hour. Claimant's paystubs also show, however, that the employer continued to pay claimant for some hours worked at a \$35.36 per hour pay rate. The record fails to show what type of work was paid at the higher hourly rate, or to which work claimant's hourly rate was reduced, and, given that OAR 471-030-0038(5)(d) specifies that the reduction in the rate of pay must be 10% or more, the record lacks sufficient evidence from which to calculate the reduction in claimant's case. On remand, the ALJ must inquire with the parties about claimant's pay structure and actual reduced pay rate, the amount of the pay rate reduction, and to which hours or percentage of hours the reduction applied. The ALJ should also inquire with the Department's witness about the Department's interpretation of how the 10% reduction is calculated, for example, whether the percentage is calculated based on a rate-to-rate comparison (e.g. whether the reduced rate of pay - \$26.43 per hour - is more than 10% below the median rate of pay) or on an average (e.g. whether the average of all of his rates of pay after the reduction - \$26.43 per hour for some plus \$35.36 per hour for other work - is more than 10% below the median rate of pay).

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant quit work with good cause, Hearing Decision 16-UI-70183 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-70183 is set aside, and this matter remanded for further proceedings consistent with this order.⁴

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating.

DATE of Service: November 28, 2016

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

⁴ The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-70183 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.